In The

Supreme Court of the United States

October Term, 1975

No. 74-1263

LOU V. BREWER, Warden of the Iowa State Penitentiary at Fort Madison, Iowa,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS, a/k/a ANTHONY ERTHEL WILLIAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINION BELOW

The United States District Court for the Southern District of Iowa in *Williams v. Brewer*, 375 F. Supp. 174 (SD Iowa 1974), sustained a petition for writ of habeas corpus and ordered release of the respondent, convicted of murder, from the penitentiary unless an appeal was taken or a new trial pursued by the State of Iowa within 60 days. Supplemental Appendix (Appendix F) to Peti-

tion For Writ of Certiorari. The United States Circuit Court of Appeals for the Eighth Circuit affirmed, 2 to 1, Judge Webster dissenting. 509 F. 2d 227 (8th Cir. 1975). Appendix A of the petition for writ of certiorari (A. p. 1). Thus these cases remanded a murder conviction for a new trial, holding that respondent-defendant's statements and acts in voluntarily taking police to find the victim's body were inadmissible. The jury's verdict, based on said statements and acts, had been upheld 5 to 4 by the Iowa Supreme Court in *State v. Williams*, Iowa, 182 N. W. 2d 396 (1970) (see Appendix p. 2). Iowa's petition for certiorari has been granted.

—o—

JURISDICTION

On December 31, 1974, the Court of Appeals for the Eighth Circuit filed its Opinion and Judgment (Appendix A, p. A1, Petition for Writ of Certiorari). On January 30, 1975, the Court of Appeals for the Eighth Circuit filed its order denying petition for rehearing en banc (Appendix C, p. A23, Pet. for Cert.), with three judges voting to grant the petition. Upon a motion filed by Petitioner State of Iowa, a stay of issuance of the mandate was granted on February 6, 1975, provided that an application by the State of Iowa be made to the United States Supreme Court for a Writ of Certiorari (Appendix D, p. A24, Pet. for Cert.). The jurisdiction of this Court is invoked under Title 28 U. S. C. § 1254 (1).

—o—

QUESTIONS PRESENTED

1. Should the oft-challenged doctrine of *Miranda v. Arizona*, 384 U. S. 436 (1966) now be disapproved?

2. Can an accused waive his Sixth Amendment right to counsel in absence of counsel previously retained who had advised the accused to remain silent?

3. Did the federal courts err in ignoring relevant evidence from which the jury and the Iowa Supreme Court could and did properly infer that accused waived his Fifth and Sixth Amendment rights?

4. Did the federal courts exceed their authority by disregarding the presumption of correctness given to state court written findings of fact by 28 U. S. C. § 2254 (d) and by making different findings of fact on disputed evidence contrary to the jury's verdict without an evidentiary hearing as required by *Townsend v. Sain*, 372 U. S. 293 (1963), despite a stipulation that the case be heard in U. S. District Court on the Iowa Supreme Court record?

—o—

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendments V, VI, and XIV of the Constitution of the United States, Title 18 U. S. C. § 3501, and Title 28 U. S. C. § 2254 (d) are set forth in Addendum A hereof.

—o—

STATEMENT OF THE CASE

About noon on the day before Christmas 1968, 10 year-old Pamela Powers accompanied her mother to the Des Moines YMCA. Her brother, Mark, was competing in a wrestling match and Pamela and her mother came to cheer him on. Pamela bought a candy bar but remembered playing with her puppy and asked her mother if she could go wash her hands. She was never seen alive again by any known witness except her murderer.

Two days later, Pamela's frozen body, clad only in her undershirt, was found in a ditch on a country road off the Mitchellville exist from Interstate 80, a few miles east of Des Moines. A medical examination showed that Pamela had been sexually ravaged. Seminal fluid was found in her mouth, rectum, and vagina. The medical examiner testified that there were no signs of pressure on the external areas of Pamela's neck and throat, but the interior of her mouth was torn and bruised. Death was due to strangulation.

About an hour and a half after Pamela disappeared, respondent Robert Anthony Williams, a/k/a Anthony Erthel Williams, age 25, hereinafter referred to as "Williams," a YMCA resident, was seen carrying a blanket-wrapped bundle through the YMCA lobby. YMCA personnel, who had been searching for Pamela, attempted to stop him after he walked outside. Williams shoved one of them back, jumped into his 1960 Buick and drove rapidly away. A 14 year old boy who, at Williams' request, opened the door on the passenger side of the car parked in front of the YMCA, testified that as Williams stuffed the bundle into the front seat he "saw two white

legs in it and they were skinny and white." (A. p. 63). At the trial, in April, 1969, that lad was able to identify Williams.

On the morning of December 26, 1968, Mr. McKnight, a Des Moines attorney, received a telephone call from Williams, who was then in Rock Island, Illinois (A. p. 70), about 180 miles east of Des Moines on I-80. Mr. McKnight advised him to surrender to the police in Davenport, Iowa (just across the Mississippi); that if he surrendered in Illinois it would take longer for him to get back to Des Moines (A. p. 88). At approximately 8:40 that same morning (Dec. 26), Williams surrendered to the Davenport police, who arrested and booked him, and read him the *Miranda* warnings (A. p. 42).

Meanwhile, Attorney McKnight had gone to the Des Moines police station and advised Chief of Police Nichols that Williams was going to surrender (A. p. 37). Shortly after arriving, McKnight received a telephone call from Williams from the Davenport police station. Mr. McKnight's end of the conversation was made in the presence of Chief Nichols and Captain Leaming (A. p. 37, p. 54), a veteran detective who had served the Des Moines Police Department for nearly 20 years.

Chief Nichols testified that McKnight told Williams Des Moines police officers would pick him up; "that [they] would be nice to him; that they were nice people; that they weren't going to grill him or beat him around; to come back to Des Moines with the officers and that we would talk it over in Des Moines." (A. p. 33).

During this telephone conversation, Leaming testified Mr. McKnight advised Williams, "You have to tell the

officers where the body is. . . . You have got to tell them where she is. . . . It makes no difference, you have got to tell them, you have already been on national hook-up. . . . What do I mean by national hook-up? . . . I mean you have been on television nationally, so that makes no difference. You have got to tell them where she is. . . . It makes no difference anyway. When you get back here, you tell me and I'll tell them. I'm going to tell them the whole story." Then Mr. McKnight told Williams, "Mr. Leaming is coming after you. I know this man personally, he's a fine man and he won't let any harm come to you." (A. p. 96).

Leaming and Nichols said McKnight told them that the little girl was dead when she was taken from the YMCA (A. pp. 96, 97, 108).

Mr. McKnight called Chief Nichols on direct examination and asked: "I said we all said she was probably dead when she left the hotel [YMCA?]. We all thought that. Isn't that what was said?" (A. p. 108). Nichols said, "The statement you made was, 'I figured she was dead. I know she's dead.' And I think at that point that conversation was not limited to you. I'm sure I may have said the same thing. Speculating." (A. pp. 108-109). Otherwise, Mr. McKnight did not dispute the testimony nor did he ever testify or offer evidence to the contrary.

The state trial court, following a pre-trial motion, found that an agreement existed between Mr. McKnight and the police that Williams was not to be questioned on the return trip to Des Moines; rather, he would talk to police officials, with his attorney, on arrival in Des Moines (A. p. 1). This finding was made, even though

Captain Leaming denied its existence (A. p. 54), and Chief Nichols testified, "There was no specific agreement made as far as a hard and fast agreement, you will not ask him anything, he will not tell you anything, except Mr. McKnight, over the telephone to Mr. Williams, stated, 'We will talk when you get here.'" (A. p. 40).

At approximately 9:30 A.M. Captain Leaming and Officer Nelson left Des Moines, enroute to pick up Williams (A. pp. 54, 55).

At 10:45 A.M., Williams was arraigned as a fugitive before Judge Metcalf in Davenport. Judge Metcalf again advised him of his rights and at Williams' request, had a private conference with him (A. pp. 43, 106).

Leaving the courtroom, Williams spotted a Mr. Kelly seated in the courtroom and asked if he was an attorney. The Judge said he was and Williams was granted a private meeting with Kelly (A. pp. 44, 106). After that meeting, but before the Des Moines police officers arrived, Mr. Kelly advised the Davenport police that Williams would remain silent (A. p. 73).

Williams was then taken to lunch and about 11:50 A.M., Officers Leaming and Nelson arrived at the Davenport Police Station (A. p. 74). After lunch, about 1:00 P.M., Mr. Kelly introduced Williams to Captain Leaming and Leaming advised Williams again, in the presence of Kelly, of his constitutional rights. This was the third time and last time Williams heard the *Miranda* warnings. Williams was then afforded two meetings alone with Mr. Kelly (A. pp. 75, 76).

Mr. Kelly testified that before the officers left with Williams he (Kelly) asked Captain Leaming if he could

ride back to Des Moines with Williams but that Leaming wouldn't let him (A. pp. 107, 108). Officer Leaming denied that Kelly made such a request (A. p. 56), although Judge Hanson of the U. S. District Court found that he did (Supp. Appendix F to Pet. for Cert. p. A5). Captain Leaming also denied that Mr. Kelly had told him that Williams would make no statements until he arrived in Des Moines (A. p. 78). Again, Judge Hanson believed Kelly (Supp. Appendix F p. A5). Captain Leaming, Officer Nelson and Williams left for Des Moines at approximately 2:00 P. M.

With Nelson driving and Leaming and Williams in the back seat of the police car, they drove west on I-80 toward Des Moines (163 miles from Davenport) (A. p. 77). A short distance out of Davenport, Williams "initiated a conversation" with Captain Leaming (A. p. 79). He asked Leaming if Leaming hated him or wished to kill him. He asked Leaming if they had checked for fingerprints in his room at the YMCA and whether they had questioned his friends or searched their houses. They discussed police procedures and religion, Williams telling Leaming about his interests in youth groups and playing the piano, organ, and singing (A. pp. 56, 79-81). Leaming testified that Williams asked questions about the missing Powers child (A. p. 57).

"Not very far out of Davenport" Captain Leaming testified *at the trial* he told Williams:

> "I want to give you something to think about while we're traveling down the road. Number one, I want you to observe the weather conditions, its raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all." (A. p. 81.)[1]

The foregoing testimony is undisputed and is quoted by the majority opinion of the Eighth Circuit (Appendix A, Pet. for Cert., p. A5).

In response to a question by Williams, Captain Leaming told Williams he had a theory Pamela's body

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1 At the pre-trial **suppression hearing,** Leaming's testimony was essentially the same:

> "'Reverend, I'm going to tell you something. I don't want you to answer me, but I want you to think about it when we're driving down the road.' I said, 'I want you to observe the weather. It's raining and it's sleeting and it's freezing. Visibility is very poor. They are predicting snow for tonight. I think that we're going to be going right past where that body is, and if we should stop and find out where it is on the way in, her parents are going to be able to have a good Christian burial for their little daughter. If we don't and it does snow and if you're the only person that knows where this is and if you have only been there once, it's very possible that with snow on the ground you might not be able to find it. Now I just want you to think about that when we're driving down the road.' That's all I said."

was in the Mitchellville, Iowa, area (A. pp. 63, 81).[2] Captain Leaming concluded this conversation by saying, "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road." (A. p. 81). This testimony, which was undisputed at the trial, was not quoted in the majority opinion in the Eighth Circuit, but was emphasized in Judge Webster's dissent (App. A of Pet. for Cert. p. A17). This is the only time Captain Leaming mentioned locating the body (A. pp. 63, 64) and was at least two hours before they got to Mitchellville where the body was found (A. p. 8).

Williams testified at the *suppression hearing* that Leaming questioned him "periodically concerning" the location of the body and speculated that it was near Mitchellville (A. pp. 47, 48).

According to Captain Leaming, during the trip to Des Moines, Williams stated several times, "When I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story." (A. pp. 58, 61).

As they approached the Grinnell turnoff of I-80, approximately 100 miles west of Davenport, Williams asked, "Did you find her shoes?" (A. pp. 58, 81). Captain Leaming replied that he did not know, whereupon Williams directed the officers to a Skelly service station where he said he'd disposed of the shoes (A. pp. 81, 82). Williams' question about the shoes was not in response to any questioning by the officers (A. pp. 59, 62). After an unsuccessful search for the shoes, they returned to the Interstate.

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2 Judge Hanson of the U. S. District Court found that in fact Leaming "did not know that the body was near Mitchellville, and he made the statement to induce [Williams] to tell him where the body was." Supp. Appendix F, Pet. for Cert. p. A8.

As they proceeded toward Des Moines, Williams asked, "Did you find the blanket?" (A. p. 83). Leaming answered that if it was with the other clothing in a trash receptacle it had been found. Williams told Leaming he had put it in the same room (at a rest stop) but "it was over by a toilet." Williams then directed them to a rest area off I-80 where he said he had disposed of the clothing and blanket. Both clothing and blanket had already been found (A. p. 101). Williams' initial question about the blanket was not a result of any question asked him by Captain Leaming (A. p. 62).

They drove on toward Des Moines. Captain Leaming and Williams had discussions about people, religion, intelligence and friends of Williams. Some distance east of Mitchellville, Williams stated, "*I am going to show you where the body is.*" (A. p. 84). Nothing in the record suggests that Williams' statement was either coerced or in direct response to any question asked him. He then proceeded to direct the officers to the location of the body off the Mitchellville turnoff south of I-80 (A. pp. 101-102).

Williams was convicted, by jury verdict, of the crime of first degree murder and sentenced to life imprisonment in the Iowa State Penitentiary. In December, 1970, his conviction was affirmed 5 to 4 by the Iowa Supreme Court, the majority of the Court finding that Williams had waived his constitutional rights and voluntarily made statements which incriminated him (A. p. 2).

In October, 1972, Williams filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Iowa. Federal District Judge Hanson sustained the petition, finding that Williams' con-

stitutional rights guaranteed by the 5th, 6th, and 14th Amendments had been violated. Said judgment was affirmed by a three judge panel of the Court of Appeals for the Eighth Circuit, Judge Webster dissenting. Petition for rehearing en banc was denied, Chief Judge Gibson and Judges Stevenson and Webster voting to grant rehearing.

Judge Hanson found that Williams' statements "were obtained only after Detective Leaming's use of psychology on a person whom he knew to be deeply religious and an escapee from a mental hospital—with specific intent fo elicit incriminating statements" and that "the State has produced no affirmative evidence whatsoever to support its claim of waiver and, *a fortiori*, it cannot be said that the State has met its 'heavy burden' of showing a knowing and intelligent waiver of Fifth and Sixth Amendment Rights." (Supp. Appendix F to Pet. for Cert. pp. A24, A27). The state contends that there is little support *in the record* for Judge Hanson's finding that Detective Leaming used psychology. Leaming did call him "Reverend" (A. p. 63), said that the parents should be entitled to a Christian burial for their daughter (A. p. 81), talked to him about religious subjects (A. p. 81) and told him that ("I myself") "had had religious training and background as a child, and . . . I would probably come more near praying for him than I would to abuse him or strike him . . ." (A. p. 80 and Supp. Appendix F p. A5 to Pet. for Cert..) where Judge Hanson cites said testimony from the Iowa Supreme Court's record (A. p. 119). (That record has been certified to this Court.) There is no evidence that Detective Leaming "knew" Williams "to be deeply religious" although the state concedes that

Leaming suspected he was. While Leaming's notions are *outside the record,* he admits he was in fact playing upon Williams' religious conscience when he made the statements which are of record. And when he addressed Williams as "Reverend" he says he did so to win his friendship and confidence.

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SUMMARY OF ARGUMENT

Miranda v. Arizona, 384 U.S. 436 (1966), should be disapproved. The sole constitutional requirement for admissibility of an incriminating statement should be whether it is given voluntarily. The Court should adopt a totality of circumstances doctrine along the lines of those which may be found in 18 U.S.C. § 3501 (Addendum to this Brief) which has legislatively overruled the application of *Miranda* in federal courts.

Respondent Williams waived both his Fifth and Sixth Amendment rights to silence and counsel after being three times warned of his rights in Davenport and after having been arraigned and consulting with counsel retained by him who advised him not to talk to the police, and after telling officers who were bringing him back to Des Moines in a police car, "When I get to Des Moines and see Mr. McKnight [my attorney], I am going to tell you the whole story."

The Federal Courts below erred in ignoring relevant evidence from which the jury and the Iowa Supreme Court could and did properly infer that accused waived his Fifth and Sixth Amendment rights.

The Federal Courts also exceeded their authority by disregarding the presumption of correctness given state court written findings of fact by 28 U. S. C. § 2254 (d) and by making different findings of fact on disputed evidence than were found by the jury, without an evidentiary hearing as required by *Townsend v. Sain*, 372 U. S. 293 (1963). The attorneys for the parties agreed to submit the case to the District Court on the record of facts and proceedings in the state trial court. The District Court was bound by those findings of fact, as was the Eighth Circuit Court of Appeals. While both courts might make different conclusions of law, based on the facts, neither had a right to change or ignore the facts of record.

This Court should extend the doctrines of federalism, comity and abstention so as to restrict the use of the writ of habeas corpus in federal courts to review criminal convictions of the Iowa Supreme Court, our highest state appellate court.

Division I

Should the oft-challenged doctrine of Miranda v. Arizona, 384 U. S. 436 (1966) now be disapproved?

Mr. Justice White predicted in his dissent in *Miranda:*

> "In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him." 384 U. S. at 763.

Unless *Miranda* is overturned or greatly restricted, this could be another of the many cases in which that

prophesy has come true. If it is to be held in this case that *Miranda* was violated and Williams' statments and acts in taking police to find Pamela's shoes, clothing, the YMCA blanket, and finally her body—statements and acts which were purely voluntary and untainted by the slightest coercion—are inadmissible where he had been advised by counsel to remain silent, the Court might as well exclude all confessions and admissions in a trial following a plea of not guilty. Under *Gideon v. Wainwright*, 372 U. S. 335 (1963), a defendant has an absolute right to counsel in a felony case. "Any lawyer worth his salt will tell the suspect to make no statement to police under any circumstances." Justice Jackson concurring in *Watts v. Indiana*, 338 U. S. 49, 59 (1949). Taken together, *Gideon* and *Miranda* compel an implication that a suspect in police custody *already* has counsel who has told him to keep his mouth shut. So no *intelligent* voluntary waiver of Fifth Amendment rights could ever be found in any felony trial in which the defendant had fled or tried to conceal his crime and later pleaded not guilty. "The result adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not." Justice White, joined by Justices Harlan and Stewart, dissenting in *Miranda*, 384 U. S. at 538.

Anyone familiar with the criminal justice system knows that police interrogation is an essential tool in effective law enforcement and without confessions, justice would be left in shambles. We simply cannot afford the luxurious equality of abandoning incustody interrogation and convictions based upon confessions. See *In Cold Blood*, by Truman Capote. As Judge Webster said in

his dissent in this case (Appendix A, Pet. for Cert. p. A20), "If such conversations can be deemed coercive, we will have turned the criminal justice system upon its head."

Any criminal jury trial is based upon a search for the *truth* and it is human nature for anyone, and surely for any policeman, prosecutor, judge, or juror, to inquire first "What does the accused say about it?" Upon being informed that he admitted his misdeed it is equally natural to wonder "Was he compelled to make the admission?" *Miranda* is destructive of these very natural inquiries and offends our Socratic method of eliciting truth—the method implicitly known by all rational beings and which is the foundation of our judicial system. Solving crime by finding truth is the policeman's duty. So it is unreasonable to insist that police must advise suspects not give them evidence they sorely need to do that duty.

No one with a sense of fair play can tolerate coercion or brainwashing, let alone torture. But it is unthinkable that people seeking the truth should be prevented from hearing the spontaneous or *voluntary* utterances of an accused within a short time after being taken into custody.

In this case, of course, there is no question but that Williams' statements and acts were the truth. Otherwise, he could not have taken the police to Pamela's body. Thus no one has suggested that Williams was compelled to make an *untrue* statement or act against his own interest as people often do under physical torture or mental coercion. In this instance, the evidence is true, reliable

and trustworthy even assuming arguendo that Williams was tortured. (If Williams was tortured here it was only by his own conscience, albeit perhaps after Captain Leaming's mention two hours earlier that Pamela's parents deserved "a good Christian burial" for their little girl who was snatched from them on Christmas Eve. Or he may have simply assumed, as many guilty do, that his statements and acts would somehow redeem him.)

There are those who argue that the law is unfair to and discriminates against a poor, ignorant man without counsel, and in favor of his more intelligent and affluent brother. If so, *Miranda* is not the answer and reduces equality to an absurdity. There is no properly protected equality of opportunity to escape the consequences of one's crime. One should not be entitled to escape having to account for his conduct merely because others more clever have escaped. "Why pick on me?" is a swan song we hear from many who are apprehended. But it is no defense that others, equally guilty, have, at least not yet, also been prosecuted.

Every person should be presumed to know his rights, just as every person is ordinarily presumed to know the law. Our people could not long tolerate a society in which ignorance of the law was an excuse. Nor can they tolerate much longer a legal justice system which excludes evidence on a minor technicality or "prophylactic standard" in disregard of the "totality of circumstances" under which that evidence was obtained.

The trouble with these arguments we make here is that Justices Clark, Harlan, Stewart and White, in their dissenting opinions in *Miranda* made all of them and

more, much more eloquently. They said virtually everything which can be said against *Miranda's* requirements, but were nevertheless barely outvoted by their brethren.

We submit that the decision of a majority 5 of the 9 justices in *Miranda*, which has stood for less than 10 years, should now be rethought in the light of the many other decisions overruled but which had worked well for nearly a hundred years before *Miranda*. *Hopt v. Utah*, 110 U. S. 574 (1884); *Pierce v. United States*, 160 U. S. 355 (1896); *Wilson v. United States*, 162 U. S. 613 (1896). Pamela Powers, who lived only 10 years herself, deserves such reconsideration.

In *Michigan v. Tucker*, 417 U. S. 433 (1974), this Court recognized that the warnings enumerated in *Miranda* were merely

> "procedural safeguards [and] *were not themselves rights* protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." 417 U. S. at 444. (Emphasis added.)

With this premises, it is at once apparent that a failure to give such warnings should not necessitate exclusion of statements in every "conceivable context." *Michigan v. Tucker*, 417 U. S. at 451. See *Harris v. New York*, 401 U. S. 222; *United States v. Watts*, 513 F. 2d 5 (10th Cir. 1975); *State v. Hudson*, 325 A. 2d 56 (Me. 1974). *Michigan v. Tucker* says:

> "the suggested safeguards [in *Miranda*] were not intended to 'create a constitutional straightjacket,' but rather to provide practical reinforcement for the right against compulsory self-incrimination." 417 U. S. at 444.

The Fifth Amendment only forbids *compulsory* self-incrimination. *Michigan v. Tucker*, 417 U. S. at 444.

We now consider under what circumstances a statement is held to be compulsory in the constitutional sense. The historical origins of the privilege against compulsory self-incrimination are delineated in *Michigan v. Tucker*, 417 U. S. at 440:

> "The privilege against compulsory self-incrimination was developed by a painful opposition to a course of ecclesiastical inquisitions and Star Chamber proceedings occurring several centuries ago. [Citations.] Certainly anyone who reads accounts of those investigations, which placed a premium on compelling subjects of the investigation to admit guilt from their own lips, cannot help but be sensitive to the Framers' desire to protect citizens against such compulsion."

While it was not merely these coercive practices at which *Miranda* was aimed, *Miranda* indicated that the nature of such practices led to its decision. 384 U. S. at 445. The practices criticized were directed at subjecting defendants to extensive, and many times elaborate, psychological interrogation and physical threats of coercion, as well as brutality—"beating, hanging and whipping—and sustained and protracted questioning incommunicado." 384 U. S. at 446. Furthermore, in each of the four cases before the Court, the majority found the defendant had been

> "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures." 384 U. S. at 457.

Here, Williams was not subjected to psychological interrogation; he was not physically threatened; and he most certainly was not "run through menacing police interro-

gation procedures." Yet *Miranda's* ritual seems to require that once he requested counsel, was advised to be silent, and said he would tell the whole story when he got to Des Moines and saw his lawyer, nothing he thereafter said to police could be used against him. It may have been "King's X" from then on. The *Miranda* remedy is sometimes analogous to using a shotgun to kill a fly—the cure is worse than the disease. Certainly that is true in this case.

First, there is no evidence that Williams was at any time physically abused. Captain Leaming reassured Williams that he would not be physically abused (A. p. 80). Next, it is uncontradicted that Williams was aware he had counsel awaiting him in Des Moines (A. pp. 55, 91), and that such counsel initially advised Williams he would have to tell where the body was (A. p. 96). Williams also had at least two private meetings with an attorney in Davenport (A. pp. 44, 75), and he had a private conference with a municipal court judge there (A. p. 43). It is inconceivable that Williams could have felt that he was being subjected to menacing, coercive police interrogation under these facts and *he never said he was.*

Williams had been given the "*Miranda* warnings" on three separate occasions before leaving Davenport (A. pp. 48, 49, 55), including once in the presence of his attorney, Kelly, by one of the officers, Leaming, who transported him to Des Moines (A. p. 55). Shortly after leaving Davenport Leaming even told Williams he did not want to discuss the facts (A. p. 81), thus re-emphasizing that Williams knew he did not have to talk to Leaming or anyone else. Any conversations between Leaming and

Williams, prior to Leaming's "Christian burial" statement, were spontaneously initiated by Williams (A. p. 79).

It was at least two hours after Leaming's "Christian burial" statement that Williams asked about the shoes and blanket (A. pp. 63, 81). Reference to the body itself was made even later. Even then Williams' statement as to the location of the body was not in response to any questioning by law enforcement officers (A. p. 84). Williams *freely* directed the police to the little girl's body (A. p. 85). Finally, what Leaming said about a "Christian burial" and his hunch that the body was located near Mitchellville was said only once, soon after leaving Davenport (A. pp. 63, 64). Such statements were not "menacing." They were not even questions.

The wrongs on which *Miranda* arose were simply not present in this case. We ask, as did Judge Henry Friendly of the Second Circuit:

> "Granted that none of these suspects should be compelled to speak by the thumbscrew or the rack, does not the overriding social interest lie in encouraging them to do so by any proper means rather than in placing every imaginable difficulty in the way of interrogation?" Henry J. Friendly, *Benchmarks,* page 278 (1967).

Williams' statements simply were not "compelled." They were volunteered. 31 A. L. R. 3rd 565, 676-680 and cases cited.

Under *Miranda* custodial interrogations are ordinarily inherently compelling. Indeed, many veteran detectives today believe there is no longer any real opportunity for lawful in-custody interrogation. Justice Walter V. Schaefer has written: "The privilege against self-incrim-

ination as presently interpreted precludes the effective questioning of persons suspected of crime." *Police Interrogation and the Privilege Against Self-Incrimination*, 61 Nw. U. L. Rev. 506, 520 (1966). (*Miranda*, of course, has never stopped *un*lawful interrogation by a policeman willing to lie. See Justice Harlan's dissent in *Miranda*, 384 U. S. at 516.) *Miranda* stressed the importance of the "nature and setting" of the in-custody interrogation. 384 U. S. at 445. Read in conjunction with *Michigan v. Tucker*, *supra*, it now seems that in-custody interrogations are *not* necessarily inherently compelling. In *Tucker*, after comparing the facts in the case with the "historical circumstances underlying the privilege against compulsory self-incrimination." 417 U. S. at 444, the Court stated:

> "Certainly no one could contend that the interrogation faced by respondent bore any resemblance to the historical practices at which the right against compulsory self-incrimiation was aimed." 417 U. S. at 444.

While some suspects may give compelled statements when subjected to in-custody interrogation, such statements should not be viewed as inherently compelled.

> "Not *every* person in custody is 'swept from familiar surroundings, surrounded by antagonistic faces and subjected' to unfair techniques of persuasion . . ." Friendly, Benchmarks, at 272. (Emphasis added.)

In fact, many suspects nowadays defiantly spit in the "pig" officer's face.

The privilege against compulsory self-incrimination was intended to prohibit the psychological interrogation and physical threats of compulsion referred to in *Michigan v. Tucker*, 417 U. S. at 440. In the absence of such compulsion, a failure to completely comply with the prophylactic standards of *Miranda* should not justify the *per se* finding of a Fifth Amendment violation.

18 USC § 3501

The *Miranda* dogma seems to have sprung in part from actual practices of the Federal Bureau of Investigation (384 U. S. at 483 to 486) whose director and agents we submit may have copied them from the detectives of Scotland Yard as portrayed in old movies. Upon solving the crime, movie buffs will remember that the British officer always calmly informed the suspect: "Of course you have a right to counsel and anything you say from this moment may be used against you." Decent chaps these British. But they do not exclude *voluntary* confessions which they obtain without their "caution." 384 U. S. 488 and 522. The majority in *Miranda* suggests that of the known civilized world, confessions obtained by police interrogation are actually excluded only in Scotland, India, and Ceylon. 384 U. S. 488-489. Justice Harlan points to a major exception in India and Ceylon: "if evidence is uncovered by police questioning, it is fully admissible at trial along with the confession itself, so far as it relates to the evidence and is not blatently coerced." 384 U. S. 522. And Justice Harlan also notes that Scotland's limits on interrogation nevertheless permit the judge to make restrained comment at trial on the defendant's failure to take the stand. Cf. *Griffin v. California*, 380 U. S. 609 (1965). (Incidentally, prior to *Griffin*, we prosecutors in Iowa could properly comment upon a defendant's refusal to take the stand and ask the

jury such rather obvious questions as "Ladies and gentlemen, who knows better than the defendant where he was on that awful night? The victim can't help you. She's dead. But does the defendant tell you? No, he chooses to remain inscrutable as he has every right to do, although innocence commands that he speak and his silence is consistent with guilt." Now, thanks to *Griffin,* we are too civilized to resort to such deplorable tactics which would allegedly "compel" a defendant to incriminate himself in the courtroom.

Congress saw nearly at once that the *Miranda* warnings were not sound. On May 24, 1968, less than two years after *Miranda,* the United States Senate voted 72 to 4 to make voluntary confessions and self-incriminating statements admissible provided only that they were "voluntarily given." The House of Representatives concurred on June 6, 1968, by a vote of 368 to 17, and President Johnson signed the act into law on June 19, 1968.

Thus, 18 USC § 3501 (Public Law 90-31) provided (and still does) in pertinent part:

> "In any criminal prosecution brought by the United States or by the District of Columbia, a confession [of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing] *shall be admissible in evidence if it is voluntarily given.* * * *" (Emphasis added.)
>
> * * *
>
> "The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if

> it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
>
> "The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession." *See Addendum A to this brief,* p. 76.

It is ironic that Congress has so relieved federal officers, in federal cases of the *Miranda* standards when *Miranda* was based in part upon the practice of those very officers. Federal officers are relieved but state officers bound. Only this court, or a Constitutional amendment can relieve the states from *Miranda's* requirements. As J. Edward Lumbard, Chief Judge of the Second Circuit said in 1967 in a speech to the Conference of Judges at Honolulu: "The Court has imbedded [the *Miranda* rule] in the concrete of constitutional construction and it can be blasted out only by an overruling decision . . . or by constitutional amendment."

Some federal courts have already applied the 1968 statute to federal cases. *United States v. Crocker,* 510 F. 2d 1129 (10th Cir. 1975); *United States v. Gegax,* 506 F. 2d 460 (9th Cir. 1974); *United States v. Vigo,* 487 F. 2d

295 (2nd Cir. 1973); *United States v. Pond and Fanelli*, 382 F. Supp. 556 (SDNY 1974).

In *United States v. Crocker, supra*, a criminal prosecution in the United States District Court in Oklahoma, the Court held it was not error in determining voluntariness of confession to apply the guidelines of 18 U. S. C. § 3501 and said, quite succinctly:

> "We have held that voluntariness is the sole constitutional requisite governing the admission of a confession in evidence. United States v. McCormick, 468 F. 2d 68 (10th Cir. 1972), cert. denied 410 U. S. 927, 93 S. Ct. 1361, 35 L. Ed. 2d 588 (1973); United States v. Davis, 456 F. 2d 1192 (10th Cir. 1972)."

And on the basis of *Michigan v. Tucker, supra*, at least two state cases, *State v. Statewright*, 300 So. 2d 674 (Fla. 1974) and *People v. Dean*, 39 C. A. 3rd 875, 114 Cal. Rptr. 555 (1974) have seemingly adopted a "totality of circumstances" test.

We urge a totality of circumstances test in which the circumstances are prescribed as in 18 USC § 3501, which was the second of five titles to the Omnibus Crime Control and Safe Streets Act of 1968. As we have noted, that act passed with 440 senators and congressmen voting for it and only 21 against—over 95%. Doubtless the Omnibus Crime Bill was a compromise but the purpose of the bill was to stop crime in the streets of America. It has never been fully implemented by all states who were authorized therein to enact wiretapping. Nor has there been a decision of this court supporting 18 USC § 3501. *Miranda* suggested that Congress and the states "are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it." 384 US at 490.

Obviously, the safeguards of 18 USC § 3501 are not quite as fully effective as those in *Miranda* which practically eliminate in-custody interrogation. But they are effective and honor the time-tested standard of voluntariness. That is why we ask that *Miranda* be overturned. The police interrogation in this case, if it can truly be called that, would almost certainly be held to meet the test of voluntariness if the five circumstances enumerated in § 3501 are applied.

Williams knew he was suspected of murder when he turned himself into the police at Davenport. He was immediately advised of his rights and allowed to phone his attorney in Des Moines. Within two hours he was arraigned. He had at least two private meetings with an attorney he consulted at Davenport. Before he left Davenport he had been advised of his *Miranda* rights on at least three separate occasions. He understood that he had a right to remain silent. Of course, he was without the assistance of either of his lawyers when he made his spontaneous statements and took police to Pamela's body, perhaps in violation of their directions to him. A pretrial suppression hearing was held and the statements were found to be admissible by an Iowa District Court Judge.

If Williams was as religious as he is made out to be, that fact should add to the trustworthiness of his statements. "If temporal hopes exist, they may lead to falsehood. Spiritual hopes can lead only to truth." 3 Wig-

more, Evidence § 840 p. 840 (Chadbourn Revision 1970), citing from Joy, Confessions 51 (1843).

It is doubtful that Williams would have been convicted seven years ago, not to mention today, without those statements. Someone murdered Pamela Powers and there has never been a hint of suggestion of any other suspect. If *Miranda* is strictly applied to this case, it will make a mockery of justice.

Certainly, this Court is well aware that we are not alone in our conviction that *Miranda* goes too far. In the additional view of Messrs. Jaworski, Malone, Powell and Story, at page 303 of *The Challenge of Crime in a Free Society*, a report by the President's Commission on Law Enforcement and Administration of Justice, 1967, the foregoing commissioners noted:

> "But the broadened rights and resulting restraints upon law enforcement which have had the *greatest impact* are those derived from the Fifth Amendment privilege against self-incrimination and the Sixth Amendment assurance of counsel." (Emphasis added.)
>
> "The two cases which have caused the *greatest concern* are *Escobedo v. Illinois and Miranda v. Arizona* * * *." (Emphasis added.)
>
> "Although the full meaning of the code of conduct prescribed by *Miranda* remains for future case-by-case delineation, there can be little doubt that its effect upon police interrogation and the use of confessions will drastically change procedures long considered by law enforcement officials to be indispensable to the effective functioning of our system. Indeed, one of the great State Chief Justices has described the situation as a 'mounting crisis' in the constitutional rules that 'reach out to govern police interrogation.'" (Referring in a footnote to Chief Justice Traynor.)

* * *

> "The impact of *Miranda* on the use of confessions is an equally serious problem. Indeed, this is the other side of the coin. If interrogations are muted there will be no confessions; if they are tainted, resulting confessions—as well as other related evidence—will be excluded or the convictions subsequently set aside. There is real reason for concern, expressed by dissenting justices, that Miranda in effect proscribes the use of all confessions. [Citing Mr. Justice White, joined by Mr. Justice Harlan and Mr. Justice Stewart, 384 U. S. at 538.] This would be the most far-reaching departure from precedent and established practice in the history of our criminal law."

"The Challenge" at page 306 goes on:

> "Until *Escobedo* and *Miranda* the basic test of admissibility of a confession was whether it was genuinely voluntary. Nor had there been any serious question as to the desirable role of confessions, lawfully obtained, in the criminal process. The generally accepted view had been that stated in an early Supreme Court case:
>
> > '*[T]he admissions or confessions of a prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence.*'
>
> "It is, of course, true that the danger of abuse and the difficulty of determining 'voluntariness' have long and properly concerned the courts. Yet, one wonders whether these acknowledged difficulties justify the loss at this point in our history of a type of evidence considered both so reliable and so vital to law enforcement."

Moreover, Dean John Henry Wigmore, more than 25 years before *Miranda*, wrote:

> "The privilege has . . . been so extended in application beyond its previous limits as almost to be incredible, certainly to defy common sense . . . courts should unite to keep the privilege strictly within the limits dictated by historic fact, cool reasoning and sound policy."

Concurring in *Griffin v. California*, 380 U. S. 609, 617 (1965) Mr. Justice Harlan expressed "the hope that the court will eventually return to constitutional paths which, until recently, it has followed throughout its history."

At least except as we have heretofore noted from *Miranda* about the limiting effects on police interrogation in England, Scotland, India and Ceylon, most countries of the world allow their police almost complete freedom in interrogating suspects. Few countries have anything comparable to our Bill of Rights, and certainly to our Fifth Amendment. No other nation on earth besides ours bars absolutely from evidence a defendant's voluntary statement. Evidence resulting from wrongly obtained confessions is as admissible in Australia (and in England) as any other evidence, if it is relevant and voluntarily obtained, even though steps may be taken to punish by other process the persons guilty of illegally obtaining it. *Cross and Wilkins on Evidence*, London, 1964, p. 161.

Indeed, Mr. Justice Benjamin Cardozo said of the privilege against self-incrimination:

> "This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its

> scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. . . . Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry?" *Palko v. Connecticut*, 302 U. S. 319, 325-26 (1937).

We would not for the moment suggest that the Fifth Amendment be abolished or that anyone should, to use the precise words of the amendment "be compelled in any criminal case to be a witness against himself." Nor do we think anyone should be compelled to be a witness against himself *before* any criminal case, at least absent immunity from use of the evidence against him. But we do implore this Court to reconsider and overturn *Miranda* in favor of the more recent reasonable rule so overwhelmingly enacted by the Congress for the federal courts eight years ago. 18 USC § 3501, Addendum A. And we do confess to equally as strong feelings about this as those expressed by Justice Musmanno in his dissent in *Commonwealth v. Banks*, 429 Pa. 53, 239 A. 2d 416, 419 (1968) handed down the day before his death.

The Exclusionary Rule Attacked

The United States Supreme Court did not apply the exclusionary rule to illegally obtained evidence to state courts until *Mapp v. Ohio*, 367 U. S. 643 (1961). Thereafter, state courts, as federal courts, were required to blind themselves to overwhelmingly persuasive evidence found in the possession of a defendant by unlawful means. Thus in many if not most such cases the defendant, and always the officer, went unpunished for their transgressions. Only the victims, their families and loved ones, and society, were made to suffer for the defend-

ant's crime and the policeman's often very technical violations of rights. "The criminal is to go free because the constable has blundered" Judge Cardozo noted in *People v. Defore,* 242 N. Y. 13, 21, 150 N. E. 585, 587 and "Society [is deprived] of its remedy against one lawbreaker because he has been pursued by another." Justice Jackson in *Irvine v. California,* 347 U. S. 128, 136 (1954). See also 8 Wigmore on Evidence, (3rd ed.) § 2184, p. 40.

While private litigants may use illegally obtained evidence, the people cannot.

Criminals are the *only* real beneficiaries of the exclusionary rule. The rights of innocent citizens are very rarely protected by it. As a consequence felons are frequently permitted to roam at large in our society and repeat their crimes upon helpless victims simply because officers made mistakes in tracking them down.

Is it any wonder that our officers and prosecutors today simply throw up their hands and give up? Even the most dedicated policeman who, prior to the exclusionary rule, would relentlessly track a suspect through the bitter cold of a winter evening will now simply seek a warm cafe in which to have a cup of hot coffee because he knows that even if he gets his man he'll have to tell him to shut up and ignore the heroin in his grip.

We submit that the President's Commission on Law Enforcement and Administration of Justice, the Omnibus Crime Control and Safe Streets Act of 1968 and all of the millions expended by the Law Enforcement Administration Agency (LEAA) have not made things one whit better. There are more crimes and criminals in our society today than ever before. The liberals' answers to the problem have been a disaster—a disaster which was predicted by experienced and dedicated prosecutors and law enforcement officials throughout our land ever since it was first decided that the exclusionary rule was the way to stop violations of the rights of our people. We in the heartland of America ask this Court to reassess the situation and give a little less emphasis to rights and a little more to duty.

Trickery and Deceit

Historically, neither our courts nor out citizens have been offended by the use of a little trickery or deceit as long as it has not been of such a nature as to induce a false confession. What is really wrong with tricking man into telling the truth? That is one of the goals of a good Perry Mason type cross-examination.

It has been held that a valid confession may be obtained by leading the subject to believe there is more proof of his guilt than actually exists. *People v. Thompson,* 133 Cal. App. 2d 4, 284 P. 2d 39 (1955). For example, it used to be that a defendant could be told that his fingerprints were found at the scene of a crime when, in fact, they had not been. *People v Connelly,* 195 Cal. 584, 234 Pac. 374 (1925); *Lewis v. United States,* 74 F. 2d 173 (9th Cir. 1934). And the interrogator used to be able to deceive a suspect into believing that his accomplice had confessed and implicated both himself and the suspect. *Osborn v. People,* 83 Colo. 4, 262 Pac. 892 (1927); *State v. Palko,* 121 Conn. 669, 186 Atl. 657 (1936) and *Commonwealth v. Green,* 302 Mass. 547, 20 N. E. 2d 417 (1939), in which the accused was shown a faked telegram

purporting to come from another police department and revealing that an accomplice had confessed.

Before *Miranda* warnings were required it had been held permissible for an investigator to pose as a fellow prisoner, or even as a friend of the suspect, and a confession obtained as a result of such trickery was admissible. *People v. White,* 176 N. Y. 331, 68 N. E. 630 (1903). Perhaps such trickery as this is still allowed even now, although *cf. Massiah v. United States,* 377 U. S. 201 (1964).

There are of course tricks which should not be tolerated such as an investigator posing as an attorney for the suspect, because a suspect has a right to believe in the attorney-client privilege. *People v. Barker,* 60 Mich. 277, 27 N. W. 539 (1886). But it was held permissible for a police officer to pose as a witness to a crime and "identify" the suspect as the perpetrator in *United States v. Murphy,* 227 F. 2d 698 (2nd Cir. 1955).

A previously sanctioned tactic was that of an investigator to make false notes purporting to come from one prisoner to another and thereby eventually procuring a statement in the handwriting of the other admitting his guilt. *State v. Dingledine,* 135 Ohio St. 251, 30 N. E. 2d 660 (1939). And a confession's admissibility has been considered unaffected by the fact that the interrogation of a murder suspect is not told that his victim has died from his act but is questioned only about the act itself. *Commonwealth v. Johnson,* 372 Pa. 266, 93 A. 2d 691 (1953).

All of these practices involved a degree of trickery or deceit which, prior to *Miranda,* might have been allowed except as noted. Ordinarily, the innocent cannot be tricked or deceived into confessing a crime they did not commit. Nowadays, people stand up and cheer at certain tactics used by Kojac, McCloud and Columbo, not to mention John Wayne who asked in *True Grit,* "How do you serve a writ on a rat?"

Let's find some substitute for excluding relevant and persuasive evidence. Let's take the handcuffs off the police and put them on the criminals.

Division II

Can an accused waive his Sixth Amendment right to counsel in absence of counsel previously retained who had advised the accused to remain silent?

The decision reached by the federal district court and accepted by the Eighth Circuit Court of Appeals in this case creates a *per se* right to counsel rule: once an accused has counsel, he cannot effectively waive his right to counsel for purposes of interrogation, absent presence of (or notice to) counsel (Supp. App. F, Pet. for Cert. p. A15 and App. A, Pet. for Cert. p. A14).

The facts relied on by the Courts below in making this determination are:

1. The police violated an alleged agreement they had with Attorney McKnight that Williams would not be questioned before consultation with Mr. McKnight in Des Moines, but which agreement the police deny was ever made.

2. The fact that Attorney Kelly had been denied his request to accompany Williams to Des Moines, which request Captain Leaming denied Kelly made.

3. An interpretation of the statement by Williams "when I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story" as meaning a request to remain silent until in the presence of counsel.

This Court's decisions in *Massiah v. United States,* 377 U. S. 201 (1964), *Escobedo v. Illinois,* 378 U. S. 478 (1964); and *Miranda v. Arizona,* 384 U. S. 436 (1966) are the foundation upon which the *per se* rule of waiver of counsel is based. *United States v. Durham,* 475 F. 2d 208 (7th Cir. 1973); *United States v. Wedra,* 343 F. Supp. 1183 (S. D. N. Y. 1972); *United States ex rel. Magoon v. Reincke,* 416 F. 2d 69 (2d Cir. 1969). See also footnote 3, *Mathies v. United States,* 374 F. 2d 312 (D. C. Cir. 1967), wherein (now) Chief Justice Burger stated "[t]he prospective application of *Miranda* . . . plainly will require that such interviews can be conducted only after counsel has been given an opportunity to be present." 374 F. 2d at 315 (n. 3).

Massiah could not have waived his right to counsel because he did not know his incriminating statements were being overheard by law enforcement officers who were using an electronic device to eavesdrop on his conversation with his friend who was wired by police for sound. The crucial point was the acquisition of incriminating information by police from an unsuspecting accused. Under those circumstances the accused could not effectively exercise or waive his right to the lawyer he had already retained.

Although Mr. Justice White in his dissent envisioned that *Massiah* would mean all admissions would be deemed involuntary if made outside the presence of counsel (377 U. S. at 210) several courts have refused to extend the decision to the point where no valid waiver can be made in counsel's absence, after counsel is retained. *United States v. Anderson,* (5th Cir., filed November 28, 1975), 18 Cr. L. 2265; *Moore v. Wolff,* 495 F. 2d 35 (8th Cir. 1974); *United States v. Springer,* 460 F. 2d 1344 (7th Cir. 1972), *cert. denied,* 409 U. S. 873 (1973); *United States v. Crisp,* 435 F. 2d 354 (7th Cir. 1971), *cert. denied,* 402 U. S. 947 (1971); *United States v. Garcia,* 377 F. 2d 321 (2d Cir. 1967); *Stowers v. United States,* 351 F. 2d 301 (9th Cir. 1965).

Judge Hanson's reliance upon *Escobedo v. Illinois,* 378 U. S. 478 (1964) as establishing a *per se* counsel waiver rule is also misplaced. First, *Escobedo* indicated that "the accused may, of course, intelligently and knowingly waive his privilege against self-incrimination and his right to counsel either at a pre-trial stage or at the trial." 378 U. S. at 490, footnote 14. Secondly, this Court has consistently held since *Johnson v. New Jersey,* 384 U. S. 719 (1966), that *Escobedo* is not to be broadly extended beyond the facts of that particular case. *Frazier v. Cupp,* 394 U. S. 731 (1969); *Michigan v. Tucker,* 417 U. S. 433 (1974).

This case clearly does not come within the narrow confines of *Escobedo* because: (1) Williams was effectively advised of his absolute right to remain silent, and (2) it is straining to interpret Williams' statement, "When I get to Des Moines and see Mr. McKnight, I

am going to tell you the whole story," as a request to consult with his lawyer before saying any more.

Aside from these particular factual differences, the police conduct in *Escobedo* was markedly different than in the instant case. In *Escobedo,* a police officer who grew up in Escobedo's neighborhood, assured Escobedo that he and his sister would be allowed to go home and that they would only be witnesses if they made a statement against Di Gerlando, a confederate. Further, while denying continual requests from both Escobedo and his attorney to talk to each other, the police told Escobedo his lawyer did not want to talk to him. Escobedo was also told by the police that they had convincing evidence he had fired the fatal shot.

The compelling atmosphere in *Escobedo* was just not present in the case at bar. Williams was assured and reminded that his attorney was waiting for him in Des Moines (A. pp. 51, 91). Williams knew and understood his rights and had been advised by two attorneys not to talk until he returned to Des Moines and saw Attorney McKnight. The doctrine of *Escobedo* should not control the outcome of this case.

Nothing in *Miranda v. Arizona,* 384 U. S. 436 (1966) suggests that an accused cannot make a valid waiver absent the presence or knowledge of his counsel. To the contrary, the Court stated:

> "If the interrogation continues without the presence of an attorney and a statement is taken, a *heavy burden* rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." 384 U. S. at 475. (Emphasis added.)

As stated in *Moore v. Wolff, supra*:

> "If an accused can voluntarily, knowingly, and intelligently waive his right to counsel before one has been appointed, there seems no compelling reason to hold that he may not voluntarily, knowingly, and intelligently waive his right to have counsel present at an interrogation after counsel has been appointed." 495 F. 2d at 37.

Further, *Miranda* expressly provides that volunteered statements are admissible. 384 U. S. at 478. See also 31 A. L. R. 3rd 565, 676.

The constitutional right to counsel is inherently a personal right, one that belongs only to the accused. It is his decision, once he is adequately aware of the right, whether he wishes to avail himself of the privilege to have counsel or whether he will waive that privilege. If an accused can waive his Sixth Amendment right to assistance of counsel at trial, *Faretta v. California,* 95 S. Ct. 2525 (1975), it seems only logical that he can waive right to counsel for purposes of interrogation.

The facts relied on by the Courts below must be closely scrutinized to determine this critical issue. While the state district court found that an agreement did exist between the police and Mr. McKnight not to question Williams until he was returned to Des Moines and in the presence of Attorney McKnight, the facts are certainly not clear. Captain Leaming emphatically denies the existence of any agreement (A. p. 54). Chief of Police Nichols testified "there was no specific agreement made as far as a hard and fast agreement, you will not ask him

anything, he will not tell you anything, except Mr. McKnight, over the telephone to Mr. Williams, stated, 'We will talk when you get here.' " (A. p. 40).

It appears that at the suppression hearing the state district court found an agreement between the police and Attorney McKnight based on the advice Mr. McKnight gave Williams during their telephone conversation. Because Chief Nichols and Captain Leaming overheard Attorney McKnight's end of the conversation, state district judge Denato apparently concluded they became bound by Mr. McKnight's advice to his client, when they said nothing. While the finding had an agreement did exist between the police and Mr. McKnight is questionable, the existence and purported violation of it could not prevent Williams from ever effectively waiving his rights. Nor did it require Officers Leaming and Nelson to plug their ears on the trip back from Davenport.

Regardless of the existence of the agreement, a violation of that agreement does not rise to a constitutional deprivation of right to counsel. Even if the agreement was broken, and Williams was "interrogated" on the trip to Des Moines, he did not lose the ability to make an effective waiver. Counsel cannot make a binding contractual agreement with police to limit his client's prerogative to *either* assert or waive his *client's* constitutional right. *Cf., Brookhart v. Janis,* 384 U. S. 1 (1966). It is Williams' rights with which we are concerned here—not Mr. McKnight's.

The record is devoid of any evidence that Williams was told by the officers that he must submit to questioning without his attorney present. Williams knew that

both Attorney McKnight and Attorney Kelly had told him to remain silent. After being given three separate *Miranda* warnings, he also knew and understood he didn't have to answer any questions until he was with his attorney in Des Moines. The vital question to be determined is whether Williams was deprived of a constitutional safeguard. An incident that occurs between the police and counsel, without more, could not affect Williams' ability to control his personal constitutional right.

The same rationale should apply to the disputed fact that Attorney Kelly was denied permission to accompany Williams to Des Moines. It is significant that the request, if it came at all, came from Kelly and not Williams. Nothing in the record indicates that Williams desired to have Kelly with him. Again, the constitutional right to counsel belonged to Williams, not Kelly. It was Williams' decision to either assert or waive it. Counsel could not do it for him.

The Sixth Amendment does not require that an attorney be with his client whenever the attorney feels it is necessary. If the accused is fully aware of the right, the bare fact that counsel isn't present cannot affect the ability of the accused to effectively waive the right.

This Court, in deciding the issue of standing to invoke a constitutional right, has stated that constitutional rights are personal and may not be asserted vicariously. *Broadrick v. Oklahoma,* 413 U. S. 601 (1973); *Alderman v. United States,* 394 U. S. 165 (1969). While this case does not present a standing issue, this principle enunciated by the Court has direct application.

What would Kelly have done had he gone along except insist that Williams shut up? And if Williams persisted, would it have been Kelly's duty to physically silence him? Suppose, on approaching the Mitchellville turnoff, Williams suddenly blurted, as he actually did, "I am going to show you where the body is." We suppose Kelly would have insisted, "Oh, no you're not—drive on," in which case Pamela might not have been found under the snow for months. That may have been Kelly's *duty*, like it or not.

The Sixth Amendment privilege to counsel must necessarily be the right of the criminal accused to be afforded counsel when the *accused* deems it necessary. *Cf., Faretta v. California*, 95 S. Ct. 2525 (1975).

The heavy reliance of the lower courts on the alleged broken agreement and the purported denial to counsel in determining that Williams could not effectively waive his right to counsel absent counsel's presence, contravenes the fundamental personal nature of the right to counsel. To so hold destroys the long standing test of waiver: whether the accused himself "intentionally relinquished or abandoned a known right or privilege." *Johnson v. Zerbst*, 304 U. S. 458 (1938).

Although the third factor relied on by the Courts below—Williams' statement, "When I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story,"—necessarily includes a Fifth Amendment question, the lower Courts consider it critical in finding a violation of a Sixth Amendment privilege.

The decisions below, in interpreting the statement made by Williams as an assertion that he would make no

statements until he was in Des Moines with his attorney, McKnight, are suggesting that once a request for counsel is made by an accused and he subsequently gives incriminating statements absent the presence of his counsel, those statements must be excluded—regardless of the surrounding circumstances.

Initially, as stated by Judge Webster in his dissent in the Eighth Circuit, the phrase "When I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story," is ambiguous on its face. The statement of the accused in *Frazier v. Cupp*, 394 U. S. 731 (1969), "I think I had better get a lawyer before I talk any more. I am going to get in trouble more than I am now," 394 U. S. at 738, is clearly less ambiguous than the statement of Williams. In *Frazier*, the Court said, "it is possible that the questioning officer took petitioner's remark not as a request that interrogation cease but merely as a passing comment." 394 U. S. at 739. While the facts in *Frazier* were pre-*Miranda*, and the Court said, "We might agree [with Petitioner's claim of Sixth Amendment violation] were *Miranda* applicable to this case, . . .", 394 U. S. at 738, it is important in assessing the meaning of Williams' statements. As in *Frazier*, Williams had demonstrated his willingness to talk to Captain Leaming (A. pp. 56, 57, 81). It is possible that Captain Leaming interpreted Williams' "when I get to Des Moines" statements as no more than passing comments.

Another critical factor ignored by the federal courts is the timing of the statements of Williams. Captain Leaming's "Christian burial" statement, his theory that the body was near Mitchellville, and the suggestion they

stop and locate the body, occurred shortly after they turned onto I-80 and headed for Des Moines (A. p. 63). This statement was made only once (A. pp. 63, 64). But it was the only "interrogation" mentioned by the federal courts (although it appears they obviously suspected there was more).

The record does not indicate *when* Williams made his statements, "When I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story." Nothing in the record tells us whether these statements occurred before or after Leaming's "Christian burial" statement. But one such statement "came not too long after we got on the freeway." (A. p. 65). That was about the time Leaming made his "Christian burial" statement (A. p. 63).

The lower Courts attached no significance to the time sequence of the statements. Without knowing when Williams' "when I get to Des Moines" statements occurred, it is impossible to determine with certainty that the dictates of *Miranda* were violated. 384 U. S. at 474.

In *Michigan v. Mosley,* 96 S. Ct. 321 (1975), a police officer was permitted to interrogate a suspect who had earlier invoked his right to remain silent during questioning by another officer. The court held he could subsequently waive a right he had previously invoked and that the later waiver did not *per se* violate his *Miranda* rights after he was warned again. *Mosley* is narrowly drawn to apply only to the right of an accused who has earlier invoked his right to remain silent. The question of whether or not *Miranda* requires a *per se* exclusion of incriminating statements made by an accused after he has indicated a desire to see his attorney (and not merely his

right to remain silent) was left unanswered in *Mosley.* The Court refused to extend *Miranda's* requirement that "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." 384 U. S. at 473-474.

Mosley held that the foregoing passage from *Miranda* did not require that any statement taken after a suspect invokes his privilege must be excluded from evidence as the product of compulsion, even if volunteered by the person in custody without any further interrogation. *Mosley* said a blanket prohibition against the taking of voluntary statements regardless of the circumstances would transform *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity and deprive suspects of an opportunity to make informed and intelligent assessments of their interests at a later time. No particular interval of waiting time is specified in *Mosley,* although the second officer did not attempt to question *Mosley* for two hours after he had invoked his privilege.

Applying this rationale, a *per se* proscription against further inquiry after an accused's request for counsel need not be adopted. But here, Williams had counsel and his "when I get back to Des Moines" statements should not have been considered a request for such.

While in *Mosley,* a second officer advised Mosley of his rights before resuming questioning, here Williams had three times been informed of his rights. We submit that is enough.

Many courts have held that repeated warnings are not necessary to a finding that a defendant, with full knowledge of his rights, knowingly and intelligently waived them. *Biddy v. Diamond,* 516 F. 2d 118 (5th Cir. 1975); *United States v. Anthony,* 474 F. 2d 770 (5th Cir. 1973); *United States v. Osterburg,* 423 F. 2d 704 (9th Cir. 1970), *cert. denied,* 399 U. S. 914 (1970); *Miller v. United States,* 396 F. 2d 492 (8th Cir. 1968), *cert. denied,* 393 U. S. 1031 (1969).

Mr. Justice White, in his concurring opinion in *Mosley,* indicates that the Court in *Miranda* did, in fact, create a *per se* rule against further interrogation after an assertion of the right to counsel. 96 S. Ct. at 329.

We submit that *Miranda* should not be read to mean that an accused can never effectively waive his constitutional right to counsel absent presence of counsel. Even after assertion of his right to counsel, he may very well make a voluntary, knowing and intelligent waiver. Interrogation is not then foreclosed merely because counsel has been retained or requested.

The facts of this case justify the conclusion by Mr. Justice White:

> "There is little support in the law or common-sense for the proposition that an informed waiver of a right may be ineffective even where voluntarily made." *Michigan v. Mosley, supra* at 328.

The proper inquiry is whether the prosecution has met its burden of establishing the accused was fully informed of and understood his rights and whether, having once exercised them, he can later change his mind and knowingly and understandingly waive them, whatever the

rights are. The following cases hold he can later waive his rights: *United States v. Cavallino,* 498 F. 2d 1200 (5th Cir. 1974); *United States v. Anthony,* 474 F. 2d 770 (5th Cir. 1973); *United States v. Collins,* 462 F. 2d 792 (2d Cir. 1972), *cert. denied,* 409 U. S. 988 (1972). And even though an attorney has been requested or retained, the right to an attorney can be subsequently waived. *Biddy v. Diamond,* 516 F. 2d 118 (5th Cir. 1975); *United States v. Dority,* 487 F. 2d 846 (6th Cir. 1973); *United States v. Springer,* 460 F. 2d 1344 (7th Cir. 1972), *cert. denied,* 409 U. S. 873 (1973); *United States v. Brown,* 459 F. 2d 319 (5th Cir. 1972), *cert. denied,* 409 U. S. 864 (1973); *Coughlan v. United States,* 391 F. 2d 371 (9th Cir. 1968), *cert. denied,* 393 U. S. 870 (1968).

Thus we contend the federal courts erred in concluding Williams could not, and did not, waive his right to the presence of counsel. Not only would a *per se* no waiver rule erode the fundamental personal nature of a constitutional privilege, such a rule would effectively exclude all confessions, as indicated at the beginning of Division I, in the face of society's burgeoning crime problem. Valuable and trustworthy evidence could be lost forever because police would not be able to take an otherwise voluntary statement from an informed accused whose counsel was not present (or notified) when his client desired to confess.

Mr. Justice Jackson, concurring in the result in *Watts v. Indiana,* 338 U. S. 49 (1949), stated the problem confronting our criminal justice system:

> To subject one without counsel to questioning which may and is intended to convict him, is a real peril

to individual freedom. To bring in a lawyer means a real peril to solution of the crime because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." 338 U. S. at 59.

Division III

Did the federal courts err in ignoring relevant evidence from which the jury and the Iowa Supreme Court could and did properly infer that accused waived his Fifth and Sixth Amendment rights?

The Federal District Court and the Circuit Court found that *no* facts exist to support the finding of the Iowa Supreme Court that Williams waived his constitutional rights. Relying on the language of *Miranda*—" . . . a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained," 384 U. S. at 436—the federal courts here ignore clear facts that demonstrate an effective waiver of rights. While waiver may not be presumed from silence, express words of waiver are not necessary. *Hughes v. Swenson,* 452 F. 2d 866 (8th Cir. 1971); *United States v. Hilliker,* 436 F. 2d 101 (9th Cir. 1971), *cert. denied,* 401 U. S. 958 (1971); *United States v. Ganter,* 436 F. 2d 364 (7th Cir. 1970); *United States v. Montos,* 421 F. 2d 215 (5th Cir. 1970), *cert. denied,* 397 U. S. 1022 (1970); *Bond v. United States,* 397 F. 2d 162 (10th Cir. 1968), *cert. denied,* 393 U. S. 1935 (1969).

The definition of waiver, "an intentional relinquishment or abandonment of a known right or privilege" has remained unchanged since the Court's decision in *Johnson v. Zerbst,* 304 U. S. 458 (1938). Especially since the decision in *Miranda,* state and federal courts have been struggling with the question of what facts indicate that an accused voluntarily, knowingly, and intelligently waived his constitutional rights. It is well settled, however, that the issue of waiver must depend, in each case, on all the facts and circumstances. *Johnson v. Zerbst, supra; Escobedo v. Illinois,* 378 U. S. 478 (1964); *United States v. Harden,* 480 F. 2d 649 (8th Cir. 1973).

There is no dispute that Williams was given full *Miranda* warnings on three separate occasions: by Lieutenant Ackerman of the Davenport police, by Judge Metcalf of the municipal bench of Davenport, and by Captain Leaming shortly before starting the trip to Des Moines (A. pp. 42, 106, 55).

There is no question that Williams understood his rights; he expressly stated that he did (A. pp. 49, 50, 75). Moreover, Williams exercised his known right to counsel. He spoke to Attorney McKnight via telephone and had at least two private conferences with Attorney Kelly in Davenport (A. pp. 44, 46, 75, 76). It has been held that an exercise of a known constitutional right is significant evidence in the determination of a valid waiver. *United States v. Cobbs,* 481 F. 2d 196 (3rd Cir. 1973), *cert. denied,* 414 U. S. 980 (1973); *United States v. Brown,* 459 F. 2d 319 (5th Cir. 1972), *cert. denied,* 409 U. S. 864, *reh. denied,* 409 U. S. 1119 (1972).

Attorney McKnight had advised Williams to say nothing until he returned to Des Moines. Further, Attorney Kelly had instructed him to remain silent, and, according to Williams at the suppression hearing, Kelly told the police that Williams wouldn't be talking to them until he returned to Des Moines (A. p. 47). Thus, Williams was completely aware of his rights and had received advice on what he should do.

The record reveals that soon after leaving Davenport, Williams began talking to Captain Leaming, disregarding the advice he received from counsel (A. pp. 79-81). Williams not only asked questions of Leaming concerning general subjects, he also asked direct questions dealing with the police investigation of the disappearance and death of Pamelo Powers. Williams asked Leaming if he (Leaming) hated him and wanted to kill him (A. p. 79). Further, he inquired if the police had checked his room for fingerprints, and if they had questioned his friends or searched their homes (A. pp. 56, 81). By initiating conversations concerning the crime, it seems apparent that Williams was willing to talk freely with the police, even though he had been advised to say nothing and he knew he did not have to talk. When an accused, having been fully advised of his rights, actively seeks to speak with the police about matters under criminal investigation, incriminating statements should not be excludable, the accused having indicated a clear intention to waive his rights. *Holloway v. United States,* 495 F. 2d 835 (10th Cir. 1974); *United States v. Cobbs, supra; United States v. Hopkins,* 433 F. 2d 1041 (5th Cir. 1970), *cert. denied,* 401 U. S. 1013 (1971).

Sometime *after* Williams had initiated the preceding conversations, Captain Leaming made his "Christian burial" statement heretofore repeatedly referred to (A. p. 81).

There is no evidence that indicates that statements made by Williams resulted from "interrogation" by either officer. On the contrary, the evidence is definite that prior to Williams' statement about the body, no questions were being asked him. Further, there has been no discussion whatsoever concerning the shoes and blanket; none, that is, until Williams suddenly asked about them. Leaming testified he asked no questions about the blanket because he thought it had already been found (A. p. 62).

An examination of the entire record points to a spirit of cooperation by Williams. He voluntarily surrendered in Iowa, after being told by Attorney McKnight that his return to Des Moines could be delayed if he surrendered in Illinois (A. p. 88). He talked freely to Leaming about the police investigation of the death of Pamela Powers, a discussion started by Williams. As they approached the vicinity where Williams deposited the shoes and the blanket, he asked the officers if those items had been found. Both questions by Williams were unsolicited. Again, as they neared the Mitchellville exit, Williams told the officers that he would take them to the body. In each instance, Williams, completely on his own, directed the officers to the place he disposed of the shoes, the blanket, and the body. In addition to McKnight instructing Williams that he was to make no statements until he arrived in Des Moines, McKnight also told Williams:

> ". . . You have to tell the officers where the body is. . . . You have got to tell them where she is. It makes

> no difference, you have got to tell them, you have already been on national hook-up. . . . " (A. p. 96).

Thus, even before Williams saw Captain Leaming and before Leaming made the statement about stopping to locate the body, Williams had been advised by his attorney and may well have believed he was going to have to take the police to the body.

Ignoring this extensive evidence of a knowing and intelligent waiver, the federal courts below relied on a strained construction of Williams' "when I get to Des Moines and see my attorney" statement, and other facts not found persuasive by the jury or the Iowa Supreme Court, to find that no waiver was possible.

The Federal District Court found that Leaming, in effect, "lied to" or "tricked" Williams by telling him the body was in the Mitchellville area, a fact Leaming didn't actually know, and thus induced Williams to tell him where the body was (Supp. Appendix F, Pet. for Cert. p. A8). Leaming *had* expressed his theory to Williams that the body was somewhere near Mitchellville (A. p. 61). But Williams knew Leaming was just speculating; he so testified (A. pp. 47, 48). After all, Leaming hadn't been with Williams when he had disposed of Pamela's body. Perhaps Judge Hanson thought Williams might not have verified Leaming's hunch had the guess been wrong and that Williams should have had an "equal" chance to escape a less intuitive officer. In any case, it seems to us that this circumstance is no different than confronting a suspect with the true known evidence against him. When a suspected fact turns out to be true, the only difference it makes is that instead of laughing the suspect winces.

This has not been deemed offensive even when the police misstate or falsely represent the state of the evidence. *Frazier v. Cupp,* 394 U. S. 731 (1969); *Michigan v. Mosley,* 96 S. Ct. 321 (1975).

The federal courts below also place considerable emphasis on the fact that Williams was an escapee from a mental institute. Other than the mere fact he was confined in a mental institute, there is absolutely no evidence that he was mentally incapacitated in any way. On the contrary, the Iowa District Court ordered an examination at an Iowa Mental Health Institute, and Williams was found to be competent and sane (A. p. 9). No evidence was introduced at trial to show otherwise.

We have previously discussed the alleged broken agreement between the police and Attorney McKnight not to question Williams until he returned to Des Moines, and the purported denial of Attorney Kelly's request to accompany Williams to Des Moines. These factors, if in fact they occurred, are actually irrelevant to the issue of whether Williams intentionally relinquished a known right. Waiver of constitutional rights should not be determined by a policeman's disregard of a request made by counsel. Whether or not a waiver occurs can only be determined by the circumstances of the questioning itself.

Regardless of whether Williams' "when I get to Des Moines," statements invoked his rights, he could thereafter change his mind and waive those rights previously exercised by those statements. *Biddy v. Diamond,* 516 F. 2d 118 (5th Cir. 1975); *United States v. Cavallino,* 498 F. 2d 1200 (5th Cir. 1974); *United States v. Dority,* 487 F. 2d 846 (6th Cir. 1973); *United States v. Collins,* 462

F. 2d 792 (2nd Cir. 1972), *cert. denied,* 409 U. S. 988 (1972); *United States v. Brown,* 459 F. 2d 319 (5th Cir. 1972), *cert. denied,* 409 U. S. 864, *reh. denied,* 409 U. S. 1119 (1973).

The federal courts' determination of no waiver was also based in part on the use of "subtle interrogation." (Appendix A, Pet. for Cert. p. A14). We concede that Captain Leaming wanted to find the body of Pamela Powers (A. pp. 92, 93) but his statement was hardly subtle. A true man of the cloth would more likely consider it a brickbat. *Miranda,* however, has not yet been construed to proscribe a play upon a murder suspect's religious conscience (See *Castleberry v. State,* 522 P. 2d 257 (Okla. 1974), *cert. denied,* 419 U. S. 1019 (1974)) or desire for decent burial. And we pray that it never will.

> "It seems difficult to imagine that a man under spiritual convictions and the influence of religious impressions would therefore confess himself guilty of a crime of which he was *not* guilty . . . Such spiritual convictions, or spiritual exhortations, stem from the nature of religion, the most likely of all motives to produce truth. They are therefore of a class entirely different from those that exclude confessions. A confession is excluded because the motive which induces it is calculated to produce untruth, because it is likely to lead to falsehood. If temporal hopes exist, they may lead to falsehood. Spiritual hopes can lead only to truth." 3 Wigmore, Evidence, § 840, p. 840 (Chadbourn Revision 1970), citing from Joy, Confession 51 (1842).

Religion has always played the leading role in maintaining order in every free society. Without it, our nation would flounder in hopeless oblivion.

And of all things that can never be held coercive, "subtle interrogation" must surely lead the list. For if it is subtle enough, the interrogated doesn't feel any coercion or compulsion at all.

We insist that Captain Leaming acted with signal ability in the highest tradition of police detection and that even had he resorted to singing "Bringing in the Sheaves" his splendid work should receive an award of merit rather than the condemnation of the courts.

Leaming's "psychological interrogation" is not akin to the kind of police questioning this Court has deemed repugnant. Compare the police interrogation in *Haynes v. Washington,* 373 U. S. 503 (1963); *Lynumn v. Illinois,* 372 U. S. 528 (1963); *Rogers v. Richmond,* 365 U. S. 534 (1961); *Blackburn v. Alabama,* 361 U. S. 199 (1960); *Spano v. New York,* 360 U. S. 315 (1959); *Ashcraft v. Tennessee,* 322 U. S. 143 (1944).

Williams testified at a pre-trial suppression of evidence hearing and again during an in-chambers hearing at trial. This testimony is set out in its entirety (A. pp. 46-53; pp. 67-91). Williams' main concern was for Attorney McKnight's health. Allegedly Leaming told him McKnight was having heart trouble and, because of the weather conditions, they should stop and locate the body on the way to Des Moines rather than subjecting McKnight to coming back to help find the body. Captain Leaming flatly denies making any such statements (A. pp. 61, 91), and no court has ever given Williams' allegation any credence. Further, Williams' claim of "psycho-religious" coercion loses credibility upon analysis of his testimony. Never does he even indicate that Leaming's

suggestion that the parents should be entitled to a Christian burial for the little girl influenced him to lead the police to the body.

> ([J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained until it is narrowed to a filament. We are to keep the balance true." *Snyder v. Massachusetts,* 291 U. S. 97, at 122 (1934).

Division IV

Did the federal courts exceed their authority by disregarding the presumption of correctness given to state court written findings of fact by 28 U. S. C. § 2254 (d) and by making different findings of fact on disputed evidence contrary to the jury's verdict without an evidentiary hearing as required by Townsend v. Sain, 372 U. S. 293 (1963), despite a stipulation that the case be heard in U. S. District Court on the Iowa Supreme Court record?

Subject to certain limited exceptions, § 2254 (d) of Title 28 of the United States Code (See Addendum to this Brief, p. 78) provides that a federal court presumes as correct a written determination of a factual issue made by a state court. This section, added to 28 U. C. S. § 2254 by Congress in 1966, substantially codifies the rule in *Townsend v. Sain,* 372 U. S. 293, 318 (1963), that where the state court has conducted a full and fair evidentiary hearing and made express findings of fact, the federal district court may "and ordinarily should accept the facts as found in the hearing." Where a state court has conducted a full and fair hearing relating to alleged constitutional violations, the congressional purpose and intent under the statute is to require convincing evidence before a state finding of fact may be set aside. See, S. Rep. No. 1797, United States Code Congressional & Administrative News, p. 3363 (1966); *In Re Parker,* 423 F. 2d 1021, 1027 (8th Cir. 1970). As noted by Judge Webster, "To the extent that findings of fact were indisputably made by the state trial judge, those facts are to be taken as true unless they fall within the stated exceptions of 28 U. S. C. § 2254." (Petition for Writ of Certiorari, Appendix A, p. A15. And see, *In Re Parker, supra,* 423 F. 2d at 1024; *United States ex rel. Falconer v. Pate,* 319 F. Supp. 206 (N. D. Ill., E. D. 1970).

There is a good reason to presume a state trial court's resolution of facts as correct. The state court hears the witness testify and is best able to interpret the testimony and resolve conflicts or inconsistencies which may exist. As noted by Mr. Justice Jackson in a concurring opinion in *Brown v. Allen,* 344 U. S. 446, 535-536 (1953):

> "Of course, this Court never has considered itself foreclosed by a state court's decision as to the facts when that determination results in alleged denial of a federal right. But captious use of this power was restrained by observance of a rule, elementary in all appellate procedure, that the findings of fact on a trial are to be accepted by an appellate court in absence of clear showing of error. The trial court, seeing the demeanor of witnesses, hearing the parties, giving to each case far more time than an appellate court can give, is in a better position to unravel disputes of fact than is an appellate court on a printed transcript."

And see, Stidham v. Swenson, 506 F. 2d 478, 484 (8th Cir. 1974) (Gibson, J. dissenting); *United States ex rel. Falconer v. Pate,* supra, 319 F. Supp. at 208.

The Federal District Court, after reviewing the state record, concluded contrary to the state courts, that Williams did no waive his constitutional rights . To support this conclusion, the Court below places considerable emphasis upon a finding of fact that Williams asserted his right or desire not to talk to the police in the absence of his attorney. (Petition for Writ of Certiorari, Supplemental Appendix F, pp. A5, A13, A16, A18, A24, A27). This finding of fact by the Federal Court is based solely upon the Federal Court's interpretation of a statement made by a state witness during the motion to suppress hearing.

The record of the pre-trial hearing shows that Captain Leaming testified that Williams did not request the presence of counsel on the trip to Des Moines (A. p. 58). Leaming further testified:

> "He said on several times, 'When I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story.'" (A. p. 58).

The Federal Courts below interpret this statement as a request by Williams for his counsel before giving information to the police.

A precise interpretation of this statement depends entirely upon the credibility and demeanor of the witness. Judge Webster points out this statement is "ambiguous on its face." He interprets the statement as an "assurance of cooperation" and not as an assertion of constitutional rights (Petition for Writ of Certiorari, Appendix A, p. A18). The entire record amply supports this interpretation. As demonstrated in detail in prior portions of this brief, this record is replete with evidence that Williams was more than willing to share information with the police authorities. On the other hand, the record is devoid of any clear indication that Williams preferred to talk only in the presence of his attorney.

It is significant in interpreting the true meaning of the statement that it was made by a state witness. Moreover, although Williams testified at the suppression hearing, nowhere does his testimony reflect in any way that he expressed a desire to have counsel present during the trip.

The state trial court, which heard Leaming testify did not interpret the statement as an assertion of constitutional rights. In fact, while the state court questioned the candor of Captain Leaming, it expressly found "an absence on the Defendant's part of any assertion of his right or desire not to give information absent the presence of his attorney . . ." (A. p. 1). On independent review of this record, the majority of the Iowa Supreme Court also was undisturbed by Leaming's testimony and relied upon the trial court's finding of fact (A. pp. 7-8, 9).

Both the Federal District Court and majority of the Eighth Circuit determined that the issue of waiver is a federal question. As such, the courts below assert they are obligated to make their own independent determination of the question. However, it is submitted that the federal court is constrained by 28 U. S. C. § 2254 (d) when deciding an ultimate constitutional question to defer to underlying historical facts fairly found in the state court.

As illustrated by the following footnote in *Re Parker, supra,* 423 F. 2d at 1027:

> "In most instances, whether a constitutional right has been denied will depend upon resolution of mixed questions of fact and law. For example, whether a confession is 'voluntary' might turn on the factual issue as to whether a defendant's testimony that he was physically beaten was true or whether the contradiction and denial of this alleged fact by law enforcement officials should be credited. Once this purely factual question is resolved, then the legal conclusion of 'voluntariness' remains. *It is the latter issue that a federal court must always review de novo and upon which a federal court must always make an independent determination. Townsend v. Sain, supra,* 372 U. S. at 318, 83 S. Ct. 745." (Emphasis added.)

The "latter issue" referred to above is the "legal conclusion," not the "purely factual question."

Similarly, the question whether an accused waives constitutional rights turns upon historical facts — the events which transpired between the authorities and the accused. It is the resolution of these "purely factual questions," as expressly determined by a state court, that are to be presumed correct by a federal court on habeas corpus review of a state conviction. *United States ex rel. Falconer v. Pate, supra* (application of § 2254 (d) presumption of correctness to facts showing waiver).

The Federal District Court disregarded the express finding of fact fairly made by the state court. It is suggested the Court below violated the clear mandate of 28 U. S. C. § 2254 (d) that such fact was to be presumed correct by the federal court. Especially where a recorded statement is not susceptible to clear interpretation, the

presumption should operate in favor of the state judge who heard the witness testify. It was error for the federal court to set aside this finding of fact made by the state court.

A distinct, but related, question is whether the Federal District Court should have conducted an evidentiary hearing under the circumstances of this case. This Court's decision of *Townsend v. Sain, supra,* 372 U. S. at 313, establishes those circumstances when, if present, a federal habeas court must conduct an evidentiary hearing:

> "If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

In Appendix A, Pet. for Cert. p. A2, it will be noted that "The attorneys for the parties agreed to submit the case to the District Court on the record of facts and proceedings in the state trial court."

The Eighth Circuit then went on to note that the district Court "in the exercise of its discretion, agreed to review appellee's petition based upon the state court records [citations]. The District Court *accordingly made its findings of fact,* upon which it based its order, without conducting further evidentiary hearings." (Emphasis added—*no* citations.)

While it is true that the parties stipulated that the record of facts and proceedings in the trial court be submitted as the record in the federal court, the parties, at least the petitioner here, certainly did not contemplate that any different findings of facts would be made by the federal court.

And when the district court goes on to say that "The following facts are unchallenged by either party:" (on p. A2), that is simply not true as we have repeatedly shown.

When the State stipulated that the case be submitted on the record of fact and proceedings in the trial court, the State assumed the findings of fact would not be changed, at least without an evidentiary hearing. See *Townsend v. Sain, supra,* and *In Re Parker, supra.* We now contend that the respondent is bound by the findings of fact in the state court which he agreed to submit to the District Court. He could have requested on evidentiary hearing hearing but he passed up the chance when he agreed to the stipulation.

Although *Townsend* extended to the habeas *applicant* a right to present evidence to the federal habeas court under these circumstances, it is clear the *state* as well as the applicant must be given the opportunity to present evidence relevant to disputed issues. *Townsend, supra,* 372 U. S. at 322. The state is on the "same footing" as the applicant to claim the right to an evidentiary hearing where the circumstances warrant that a hearing be held. *United States ex rel. McNair v. State of New Jersey,* 492 F. 2d 1307 (3d Cir. 1974). In *McNair,* the federal district court reviewed the state court record and, without conducting

an evidentiary hearing, issued a writ of habeas corpus. In concluding an evidentiary hearing was not warranted, (as both parties also concluded in this case when they agreed to submit it on the record), the federal court pointed to certain deficiencies in the state's case which were crucial to the constitutional issues presented. The Third Circuit remanded the case to the district court, holding that the state be afforded an opportunity to present evidence bearing upon the crucial facts found deficient in the record:

> ". . . When legal problems are presented which are not easily resolved even on the basis of clearly established facts, an evidentiary hearing is an *a fortiori* proposition if the state record is deficient in critical areas. There is no need here to make the task more difficult by struggling with a self-imposed blackout of relevant matters.
>
> "Furthermore, considerations of comity and proper respect for the state courts counsel against precipitous action to invalidate their judgment. If, when viewed against the backdrop of all the facts, the state court decision may be found to be correct, it should not be overturned because it is based on less than all the information which can be made available to the district court.
>
> "While it is true that the state bears some responsibility for the proper preparation of a record, nevertheless, the public interest requires that opportunity be given to present evidence which might show that the petitioner suffered no constitutional deprivation. In certain circumstances, *Townsend v. Sain,* mandates a hearing where the material facts were not adequately developed at the state court hearing. 28 U. S. C. § 2254 provides in part that a determination by a state court shall be presumed to be correct unless it appears that the material facts were not adequately developed in the state proceeding. Both the state and the petitioner stand on equal footing to claim this right."

United States ex rel. McNair v. State of New Jersey, 492 F. 2d at 1309.

Several considerations under *Townsend* and *McNair* point unavoidably to the conclusion that the District Court in this case should have conducted an evidentiary hearing before granting this writ of habeas corpus.

The Federal District Court resolved disputed facts, felt critical by the federal court in favor of Williams. The Court found that Leaming denied a request by Attorney Kelly to ride with Williams to Des Moines (Petition for Writ of Certiorari, Supplemental Appendix, pp. A5, A10). Kelly testified to that effect at trial (A. pp. 107-108). Captain Leaming unequivocally denied that Kelly requested to ride with Williams in the police car (A. pp. 55-56). Moreover, the Federal District Court found that Attorney Kelly told Captain Leaming that Williams was not to be questioned until he arrived at Des Moines (Petition for Writ of Certiorari, Supplemental Appendix, pp. A5, A10). Williams testified to that effect at the motion to suppress hearing (A. p. 47). Captain Leaming flatly denied that Kelly made the statement to him (A. p. 60).

The Federal District Court noted that a written finding of fact was not made by the state court concerning these disputed facts "apparently because [the state court] regarded it as irrelevant to the admissibility of the challenged evidence." (Petition for Writ of Certiorari, Supplemental Appendix, p. A10). The majority of the Eighth Circuit acknowledged that the record "reveals certain discrepancies between the testimony of Mr. Kelly and Detective Leaming and certain ambiguities in some of the testimony upon which the District Court relied in making its findings." (Petition for Writ of Certiorari, Appendix A,

p. A8). The majority further finds that "the state court did not resolve 'the merits of the factual disputes.'" (Petition for Writ of Certiorari, Appendix A, p. A8). But the State district court jury was properly instructed that before it could consider statements made by Williams, it must find that they were made voluntarily. This was a proper instruction and presumably the jury made that finding if Williams' statements were considered in convicting him.

Accordingly, as relates to resolution of these factual disputes, the Federal District Court was obligated under the *Townsend* criteria to conduct an evidentiary hearing before resolving these critical facts.

The Federal Trial Court also placed considerable emphasis on the fact that Captain Leaming knew Williams was a "deeply religious person" and used that knowledge to elicit incriminating statements (Petition for Writ of Certiorari, Supplemental Appendix pp. A5, A7, A24, A27). However, the only reference on which the federal court based its finding that Leaming knew Williams was a religious person is where Captain Leaming stated, in response to Williams' question asking Leaming if he hated him and wanted to kill him:

> " . . . Also advised him that I myself had had religious training and backbround as a child, and that I would probably come more near praying for him than I would to abuse or strike him. . . . " (A. p. 80).

This sole reference in the record does not warrant a finding that Captain Leaming "knew Williams was a deeply religious person." Moreover, there is absolutely nothing in this record to indicate, as the federal court would have us believe, that Captain Leaming's statement concerning

the discovery of the body (A. p. 81), was a direct result of such knowledge. .

The federal court, in effect, made the determination that Captain Leaming lied to or tricked Williams concerning his knowledge of the whereabouts of the body and that the lie had a compelling influence upon Williams to make the incriminating statements (Petition for Writ of Certiorari, Supplemental Appendix, pp. A8, A14, A27, A29). The entire record refutes the determination of the federal court on this point. Captain Leaming's belief that the body was in the Mitchellville area was merely his personal theory (A. pp. 60-61, 63, 65). Moreover, Williams knew that it was merely Leaming's theory. Williams testified at the suppression of evidence hearing that, " . . . he (Leaming) also mentioned they had some speculation that the body was near Mitchellville." (A. pp. 47-48). Certainly Captain Leaming did not know the exact location of the body, only Williams knew this. But to infer that Leaming lied to Williams and that Williams was influenced by the lie or trick is simply not supported by the testimony.

The Federal District Court notes that the timing of the conversation between Captain Leaming and Williams is not clear in this record. The federal court, however, resolves this deficiency in the record by saying the state carried the burden to "make timing clear if it was important." (Petition for Writ of Certiorari, Supplemental Appendix, p. A28). As demonstrated in earlier portions of this brief, the timing of statements between Williams and Captain Leaming is crucial to the final determination of these constitutional questions.

As previously shown, the Federal District Court interpreted an ambiguous statement in the cold record as an assertion of constitutional rights.

In *Townsend, supra,* 372 U.S. at 315-316, this Court recognized that where difficult legal problems are presented to a federal court and it is not clear that the state court would have granted relief if a defendant's allegations were believed, the federal court has no alternative but to hold a hearing to determine the facts:

> "If any combination of the facts alleged would prove a violation of constitutional rights and the issue of law on those facts presents a difficult or novel problem for decision, any hypothesis as to the relevant factual determinations of the state trier involves the purest speculation. The federal court cannot exclude the possibility that the trial judge believed facts which showed a deprivation of constitutional rights and yet (erroneously) concluded that relief should be denied. Under these circumstances it is impossible for the federal court to reconstruct the facts, and a hearing must be held."

The Federal District Court in this case could not properly "reconstruct" the facts from the cold record to support a conclusion that Williams' constitutional rights were violated. Although the federal court believed that the combination of facts as portrayed by Williams proved a violation of constitutional rights, the law when applied to the facts presents difficult legal questions. The Federal District Court was operating on the "purest speculation" as to how the facts relating to the alleged constitutional violations were resolved in the state court.

In addition to the fact that difficult legal problems were presented, the facts relied upon by the federal court

were not clear in the record. The *McNair* decision indicates that even when difficult legal problems are presented on the basis of "clearly established facts" an evidentiary hearing should be held by a federal court before overturning a state conviction. *McNair, supra,* 492 F. 2d at 1309. The facts relied upon by the Federal District Court in the instant case were not "clearly established" in the record. Both federal courts below admit the record is deficient in critical respects. As previously shown, the facts found by the federal court are either disputed facts, based upon ambiguous statements in the record, or simply unsupported. As the *McNair* court recognized, such "precipitous" action by a federal court should not result in overturning a state court's conviction because "less than all the information which can be made available to the district court" is presented to the court.

The discrepancies, ambiguities and disputes of record facts go directly to the ultimate issues in this case. To determine such important constitutional questions without the full benefit of completely developed facts seems to fly in the teeth of the *Townsend* and *McNair* decisions. If factual discrepancies and ambiguities exist that are crucial to the determination of the ultimate constitutional issues, more is required of a federal court than a study of the bare record before upsetting a state court's determination. Just as a federal court should not deny a writ of habeas corpus on less than clearly established facts, it should not overturn a state court conviction without providing an opportunity to the state to present evidence bearing upon critical facts which are not clear in the record.

When a state court has conducted a full hearing and decided the identical questions for review in a federal

court, "extreme caution" should be exercised by the federal court when determining factual questions without conducting an evidentiary hearing. *Iverson v. North Dakota,* 480 F. 2d 414, 426 (8th Cir. 1973). The lower court's treatment of the facts under the circumstances of this case raises serious questions concerning the role of a federal court on review of a state conviction. If federal courts are hereafter allowed to resolve facts in a similar fashion, there will be little purpose in having an original adjudication of federal rights in the state courts. J. Skelly Wright and Abraham D. Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility,* 75 Yale L. J. 895, 920-922 (May 1966).

Federalism, Comity and Abstention

In the official publication of the Analysis and Interpretation of the Constitution of the United States of America, published by the U. S. Government Printing Office to June 29, 1972, at page 767, we find the following:

> "*Conflicts of Jurisdiction: Rules of Accommodation*
>
> Federal courts primarily interfere with state courts in three ways: by enjoining proceedings in them, by issuing writs of *habeas corpus* to set aside convictions obtained in them, and by adjudicating cases removed from them. With regard to all three but particularly with regard to the first, there have been developed certain rules plus a statutory limitation designed to minimize needless conflict.
>
> *Comity.*—"[T]he notion of 'comity,'" Justice Black asserted, is composed of "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and

their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism, . . ." Comity is a self-imposed rule of judicial restraint whereby independent tribunals of concurrent or coordinate jurisdiction act to moderate the stresses of coexistence and to avoid collisions of authority. It is not a rule of law but "one of practice, convenience, and expediency" which persuades but does not command.

Abstention.—Perhaps the fullest expression of the concept of comity may be found in the abstention doctrine. The abstention doctrine instructs federal courts to abstain from exercising jurisdiction if applicable state law, which would be dispositive of the controversy, is unclear and a state court interpretation of the state law question might obviate the necessity of deciding a federal constitutional issue. Abstention is not proper, however, where the relevant state law is settled nor where it is clear that the state statute or action challenged is unconstitutional no matter how the state court construes state law. Federal jurisdiction is not ousted by abstention; rather it is postponed. Federal-state tensions would be ameliorated through federal-court deference to the concept that state courts were as adequate a protector of constitutional liberties as the federal courts and through the minimization of the likelihood that state programs would be thwarted by federal intercession. Federal courts would benefit because time and effort would not be expended in decision of difficult constitutional issues which might not require decision.

During the 1960's the abstention doctrine was in disfavor with the Supreme Court, suffering rejection in numerous cases, most of them civil rights and civil liberties cases. Time-consuming delays and piecemeal resolution of important questions were cited as a too-costly consequence of the doctrine. Actions brought

under the civil rights statutes seem not to be wholly subject to the doctrine and for awhile cases involving First Amendment expression guarantees seemed to be, as well, but this appears no longer to be necessarily the rule. While the Court has ordered abstention in several recent cases, it has made clear that abstention is proper "only in narrowly limited 'special circumstances,'" which are primarily limited to matters where state law is unclear, and it has directed that ordinarily a suitor's choice of a federal forum rather than a state court should be respected.

* * *" (Footnote citations omitted.)

We submit that perhaps it is time for this Court to consider extending the doctrines of federalism, comity and abstention to writs of habeas corpus filed after a criminal court conviction has been upheld by the highest appellate state court. Usually, such courts consist of several judges—in Iowa, for example, 9 justices sit on our state Supreme Court and they sit *en banc* in the more important cases. There is no reason to suppose that the collective wisdom of these 9 judges is inferior to that of a federal district judge, or even to a panel of 3 circuit court judges hearing an appeal from the federal district court.

For 50 years or more, state attorneys general have been plagued by repeated post-conviction habeas corpus proceedings, hearings and appeals therefrom both in state and in federal courts. There seems to be no end to litigation in a given criminal case. Some defendants have had four complete rounds of post-conviction procedures through all state and federal courts.

Every man is entitled to his day in court but there is no actual federally protected constitutional right to an

appeal from a conviction in a state criminal case. Indeed, it has not been a hundred years that when a man committed murder one day and was captured the next, he was tried on the third day and hanged on the fourth. And that was with due process of law, including judge, jury, defense counsel and all. Of course errors were made, perhaps some of them grievous, and innocent men were executed. But there is little clear and convincing proof, that, as a whole, justice cannot ordinarily be achieved in such a system. And surely, one appeal is enough. We do not ask that the pendulum swing back to the days of the past but only that some post-appeal limitations be invoked.

The National Association of Attorneys General has been trying to get Congress to act in this area for more than 25 years. That Association's court test of the federal habeas corpus act proved fruitless in *United States v. Hendricks*, 213 F. 2d 922 (3rd Cir. 1954), *cert. denied*, 348 U. S. 851, although 40 attorneys general joined Pennsylvania on the brief.

The right to appeal state criminal court convictions springs from state constitutions and statutes. So, too, the right to petition for writ of habeas corpus or to appeal to the United States Supreme Court, arises from statute.

In *Younger v. Harris*, 401 U. S. 37 (1971) the Supreme Court held that the federal courts should not invoke federal jurisdiction to enjoin enforcement of a state criminal prosecution, even where First Amendment rights might be violated under a state statute which appeared unconstitutional on its face, particularly in absence of extraordinary circumstances in which irreparable injury could be shown. We think that the Court should consider extending its reluctance to interfere with pending state prosecutions to *most* state criminal cases in which a conviction has been upheld by the state's highest appellate court. See 401 U. S. at 44.

We also note that in *Rizzo v. Goode*, 44 L. W. 4095, decided on January 21, 1976, the Court extended the principles of federalism to a mayor and police commissioner in the executive branch of city government and denied a federal court's legal power to supervise the functioning of the police department of the City of Philadelphia.

If this Court has power to adopt legislative type rules to stop harassment of defendants by law enforcement officers, as it did in *Miranda*, perhaps it has power to adopt rules to stop harassment of law enforcement officers by defendants. Justice should operate in both directions.

———o———

CONCLUSION

The oft-challenged doctrine of *Miranda v. Arizona*, 384 U. S. 436 (1966) should now be disapproved and it should be held that the Respondent Williams waived his Fifth and Sixth Amendment Rights to silence and counsel, after having retained counsel who had advised him to remain silent.

It should also be held that the federal courts erred in ignoring relevant evidence from which the jury and the Iowa Supreme Court could and did properly infer that the accused had waived his Fifth and Sixth Amendment Rights.

It should also be held that the federal courts exceeded their authority by disregarding the presumption of correctness given to state court written findings of fact by § 28 U. S. C. § 2254 (d) and by making findings of fact obviously contrary to the jury's verdict on disputed evidence without an evidentiary hearings as required by *Townsend v. Sain*, 372 U. S. 293 (1963).

Incidental to the last finding, we ask this Court to consider restricting the use of the writ of habeas corpus in federal courts to review criminal convictions of the Iowa Supreme Court, or our highest state appellate court.

Finally, for all of these reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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ADDENDUM A

Constitutional Provisions

Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Constitution of the United States, Amendment XIV:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws."

Statutes

Title 18 U. S. C. § 3501, Omnibus Crime Control and Safe Streets Act of 1968:

"§ 3501. Admissibility of confessions

"(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

"(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

"The presence or absence of any of the above-mentioned factors to be taken into consideration by

the judge need not be conclusive on the issue of voluntariness of the confession.

"(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offense against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided,* That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

"(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

"(e) As used in this section, the term 'confession' means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

"Added Pub. L. 90-351, Title II, § 701 (a), June 19, 1968, 82 Stat. 210, and amended Pub. L. 90-578, Title III § 301 (a) (3), Oct. 17, 1968, 82 Stat. 1115."

Title 28 U. S. C. § 2254 (d):

"In any proceeding instituted in a Federal court by an applicant for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State Court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

———o———

CERTIFICATE OF SERVICE

I, Richard N. Winders, Assistant Attorney General for the State of Iowa, hereby certify that on the 11th day of February, 1976, I mailed three (3) printed copies of BRIEF OF PETITIONER, correct 1st class postage prepaid, to:

Mr. Robert Bartels
University of Colorado
School of Law
Fleming Law Building
Boulder, Colorado 80302

I further certify that all parties required to be served have been served.

RICHARD N. WINDERS
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